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In The
Supreme Court of the United States

EDWIN GOMEZ AND
JONATHAN S. LONDONO
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *United States v. Booker,* 125 S. Ct. 738 (2005), overruled or modified the holding in *Blakely v. Washington,* 124 S. Ct. 2531 (2004), such that a state sentencing system – which is identical in all relevant respects to the Washington system invalidated in *Blakely* – does not violate the Sixth and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

The Petitioners in this Court are Edwin Gomez and Jonathan S. Londono. The Respondent is the State of Tennessee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Edwin Gomez and Jonathan S. Londono respectfully petition jointly, under Supreme Court Rule 12.4, for a writ of certiorari to the Tennessee Supreme Court in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005).

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is published at 163 S.W.3d 632 and is reprinted at App. 1. The opinion of the Tennessee Court of Criminal Appeals is unpublished and appears at App. 146.

STATEMENT OF JURISDICTION

The Tennessee Supreme Court issued its order denying Petitioners' petition for rehearing on May 18,

2005. App. 141. This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Relevant statutory provisions of the Tennessee Code Annotated are reproduced at App. 233-261.

I. STATEMENT OF THE CASE

On February 8, 2002, the Petitioners were convicted of conspiracy to commit aggravated robbery (Count I), facilitation of felony murder (Count II), facilitation of especially aggravated robbery (Count III),and facilitation of aggravated robbery(Count IV). On April 4, 2002 both Petitioners were sentenced to the maximum of six years on Count I; the maximum of twenty-five years on Count II; the maximum of twelve years on Count III; and the maximum of six years on Count IV, with the sentences ordered to be served consecutively for a total effective sentence of forty-nine years.

Gomez and Londono appealed to the Court of Criminal Appeals, which affirmed the convictions and sentences on February 18, 2004. App. 146.

The Tennessee Supreme Court granted review on October 4, 2004, and specifically directed briefing of the *Blakely* issue. The State, acknowledging that Tennessee's system for imposing enhanced sentences was in all relevant respect the same as Washington's, conceded that the system violated the Sixth Amendment. *See* 2004 WL 3255393. The State, however, argued that Petitioners were not entitled to relief because they had not raised this issue below and they could not satisfy the several prongs of Tennessee's "plain error doctrine."

On April 15, 2005, the Tennessee Supreme Court, by a 3-2 vote, refused to accept the unanimous view of all parties that Tennessee's system for imposing enhanced sentences violates the Sixth Amendment. The Court reaffirmed the well-settled proposition that when no enhancement factors are found, Tennessee

statutory law "mandates imposition of the presumptive sentence." App. 96. However the Tennessee Supreme Court found that this interpretation did not resolve the constitutional issue:

> . . [T]o determine whether the defendants' sentences were in violation of the Sixth Amendment, the relevant inquiry is not . . . whether the Reform Act sets a determinate point at which judges must begin the exercise of their discretion and provides a determinate sentences which must be imposed *in the absence of enhancement and mitigating factors.* Rather, the relevant inquiry is whether the Reform Act mandates imposition of a sentence *increased* above the presumptive sentence *when a judge finds an enhancement factor.* Although the dissent is correct that the Reform Act requires trial judges to determine whether enhancement factors exist, the dissent fails to recognize that the finding of an enhancement factor does not mandate an increased sentence. *Booker* explains that the mandatory increase of a sentence is the crucial issue which courts must consider in determining whether a particular sentencing scheme violates the Sixth Amendment.

App. 98-99. (emphasis in original).

Following the Tennessee Supreme Court's April 15th decision, both Petitioners *and* the State petitioned for rehearing, explaining once again to the Tennessee Supreme Court that Tennessee's sentencing system was indistinguishable from the Washington system invalidated in *Blakely*. On May 18, 2005 the Tennessee Supreme Court, by the same 3-2 vote, refused to reconsider. Without disputing that Tennessee's system is the same as Washington's, the majority stated on rehearing that "[w]e remain convinced that *Blakely* must be read in light of *Booker*. . . . If the Sixth Amendment countenances a sentencing scheme that permits judges to find facts relevant to sentencing and affords judges discretion to select a sentencing anywhere within a statutory range, even in the absence of enhancing facts, we are unable to conclude that the Sixth Amendment forbids a

sentencing scheme in which a state legislature limits judicial discretion by designating the presumptive sentence that must be imposed when a judge finds no enhancement or mitigating factors." App. 143-144.

II. REASONS FOR GRANTING THE WRIT

While there are minute differences between the Washington and Tennessee sentencing structures, at bottom, both systems contain a mandatory, "presumptive" base sentence beyond which a trial judge may not exceed without additional judicial fact-finding. This case is indistinguishable from *Blakely* which held that such additional judicial fact-finding violated the Sixth Amendment.

The Tennessee Supreme Court misread *Booker* as somehow modifying or overruling *Blakely*. This interpretation is simply incorrect and represents a

fundamental constitutional error. Any modification of *Blakely* should come from this Court and not the Tennessee Supreme Court.

The decision of the Tennessee Supreme Court, if left unresolved, will foster continued confusion in other states. Indeed, there is now a spilt of authority in the United States as to whether *Booker* trumps *Blakley*. Defendants in Tennessee are still being sentenced every day in contravention of the Sixth Amendment causing enormous disruption of the criminal justice system. Notions of "plain error" under state law are best resolved in the first instance by the Tennessee Supreme Court once its fundamental misapprehension of the Sixth Amendment has been corrected. Given that there is no dispute between the Petitioners and the State of Tennessee on the constitutional question presented

here, this case is appropriate for summary reversal. Accordingly, this Court should grant the petition for writ of certiorari.

A. The Tennessee Supreme Court's Decision Is Irreconcilable With This Court's Decision In *Blakely*.

The Tennessee Supreme Court read *Booker* as departing from *Blakley* because *Booker* involved the federal sentencing scheme which had a mandatory beginning point or base number and certain mandatory enhancements. Thus, the Tennessee Supreme Court was of the view that only a mandatory presumptive sentence coupled with a mandatory enhancement scheme – resulting in a so-called mandatory sentence – violates the Sixth Amendment. The Tennessee Supreme Court's majority ruling in *Gomez* can therefore be reduced to three points: (1)

Tennessee has a mandatory presumptive sentence,[2] (2) the Tennessee sentencing enhancements are not mandatory,[3] and (3) *thus*, the entire scheme passes constitutional muster.[4]

The Petitioners assert that the first two points do not lead inevitably to the conclusion that Tennessee sentencing laws are constitutional. The Tennessee sentencing scheme violates the Sixth Amendment

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[2]The Tennessee Supreme Court held that "when no enhancement or mitigating factors are found, section 40-35-210(c) mandates imposition of the presumptive sentences." App. 96.

[3]The majority in *Gomez* repeatedly emphasized that the sentencing statutes do "not mandate an increased sentence upon a judge's finding of an enhancement factor. App. 96.

[4]The majority concluded that the Tennessee statute is constitutional because it "sets out broad sentencing principles, enhancements and mitigating factors, and a presumptive sentence, all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." App. 100.

since it is the *possibility* of a judicially imposed sentence, above the mandatory, presumptive minimum, which triggers both *Blakely* and *Booker*. The fallacy in *Gomez* is that it makes absolutely no difference if the judicially imposed enhancements are mandatory or discretionary. Once it is concluded that the statutory scheme includes a mandatory presumptive sentence or base point, the Sixth Amendment prohibits a judicially determined increase predicated on additional fact-finding.

An increased sentence was not mandated by the Washington guidelines at issue in *Blakely*. Indeed, the constitutional relevance of merely exposing a defendant to a greater punishment based on a judicial fact-finding, but still leaving it to the judge's discretion whether to impose the heightened punishment was discussed in *Blakely* itself. *Blakely*

says quite clearly that it is immaterial for Sixth Amendment purposes "whether the judicially determined facts require a sentence enhancement or merely allow it." *Blakely*, 124 S.Ct. at 2538, n.8

Blakely concerns the idea of a defendant being entitled to a particular legislatively defined ceiling unless certain specific findings of fact are made which justify enhancements to higher sentences. It is that concept of "entitlement" which dictates an inquiry as to whether the statutory scheme creates a legislative guarantee of a specific maximum sentence in the absence of additional fact-finding. *Blakely*, 124 S.Ct. at 2540. In Tennessee a defendant is entitled, as a matter of law, to a sentence at the presumptive, statutory minimum for all but Class A felonies (and then at the mid-range) when he or she begins the sentencing hearing. In the absence of proof of

enhancement factors at the end of the hearing, the defendant is still entitled to the presumptive sentence.

Booker does not salvage the Tennessee sentencing provisions. *Booker* found unconstitutional the "mandatory" portion of the federal statute. Sheared of the mandatory language, the entire federal sentencing system then became advisory. The obvious fallacy here is that the Tennessee Supreme Court read *Booker* as meaning that the sentencing calculus must also be mandatory for the entire scheme to run afoul of the Sixth Amendment: "*Booker* explains that the mandatory increase of a sentence is the crucial issue which courts must consider in determining whether a particular sentencing scheme violates the Sixth Amendment." *Gomez*, 163 S.W.3d at 661 App. 99. *Booker* said no such thing and, in any event it is hardly the "crucial issue." It is true that the federal

statute contained both a mandatory base starting sentence and mandatory numerical enhancements but simply because the federal system had more "mandatory" components did not mean that only a system which mirrors the federal structure is deficient.

Everyone agrees that the Tennessee scheme certainly does not mandate an increased sentence. The question is not what sentence is required but rather what the statute forbids. The determinative constitutional question is, instead, whether under Tennessee law a judge is forbidden by statute from enhancing a sentence unless he or she make a finding of fact to justify an enhancement which permits a greater sentence. The ruling by the Tennessee Supreme Court that the Tennessee statute "fixes a [mandatory, presumptive,] determinate point, not a

range and the trial judge has no discretion to deviate from this determinate point unless he or she makes additional findings that enhancement factors are present" (App. 118-119) *ends* the inquiry.

It matters not that the Tennessee enhancement factors are less rigid than the federal "point system" or that the Tennessee judge has the discretion to impose the minimum notwithstanding the enhancement factors. The Tennessee defendant has an entitlement to the statutory presumptive sentence and the Sixth Amendment *prohibits* enhancement factors from increasing the sentence unless found by a jury. Thus, that the Tennessee enhancements are only discretionary – and the result of the calculus is also ostensibly discretionary – makes not a bit of constitutional difference.

The Tennessee Attorney General advanced a similar analysis on Petition to Rehear in an attempt to convince the Tennessee Supreme Court that its initial April 15 opinion was off the mark:

> . . . The Court places much emphasis on the fact that, under the Reform Act, "the finding of an enhancement factor does not mandate an increased sentence" Slip op. at 27. That is true enough, in that a court is always free to sentence a defendant at or below the presumptive minimum sentence, even when an enhancement factor is applicable. But that was equally true of the Washington guidelines under review in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the New Jersey statute at issue in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the statute involved in *Jones v. United States*, 526 U.S. 227 (1999), and Arizona's capital sentencing statute under scrutiny in *Ring v. Arizona*, 536 U.S. 584 (2002), all of which were found to violate the Sixth Amendment.
>
> . . . The critical inquiry under the Sixth Amendment is *not* whether the finding of an enhancement factor mandates an increased sentence above the presumptive minimum, but whether, under the applicable statutes, the judge can increase the sentence above the presumptive minimum only by finding

additional facts. "Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 124 S.Ct. at 2538, n.8. It is as plain as a pikestaff that a Tennessee judge has no authority to impose a sentence above the presumptive minimum – the sentence authorized by the jury verdict alone – unless an enhancement factor is found. *See* Tenn. Code Ann. § 40-35-210 (c), (d). Except for the fact of a prior conviction or a fact stipulated by the defendant, *Apprendi* holds that any such fact must be found by a jury beyond a reasonable doubt. 530 U.S at 490.

. . . The decision in *United States v. Booker*, 125 S.Ct. 738 (2005), does not alter the conclusion that Tennessees scheme violates the *Apprendi* rule. While *Booker* acknowledges that sentencing guidelines that are "merely advisory provisions" and not "mandatory and binding on all judges" do not implicate the Sixth Amendment, *Booker*, 125 S.Ct. at 750, it is clear from the context in *Booker* that the Court regarded the federal sentencing guidelines to be mandatory and binding because the only means of imposing an upward departure from the base range sentence was through the application of the guidelines, which in turn required findings of fact beyond the facts necessarily found by the jury verdict. In other words, an upward departure could only be reached by following

> the guidelines. It was in that sense that the Court viewed the guidelines as mandatory and binding; it was not because they required a particular sentence. *See Booker*, 125 S.Ct. at 750-51.
>
> . . . The same is true of Tennessee's statutory scheme, which authorizes a sentence above the presumptive minimum only when enhancement factors are found. Tenn. Code Ann. § 40-35-210(c), (d).

State's Petition for Rehearing at 2-3. App. 228-231.

This Court should grant the petition for writ of certiorari and summarily reverse given that there is nothing left to argue about here. This Court has already said in *Booker* "there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue [in *Blakely*]." 125 S. Ct., at 749. That should resolve the matter.

B. The Tennessee Supreme Court's Decision Directly Conflicts With Other State Supreme Courts' Interpretations Of *Blakely* and *Booker*.

Review is appropriate here because of the split of authority among the states as to whether *Booker* effectively "overruled" *Blakely*. In *People v. Black*, 35 Cal.4th 1238 (2005), the California Supreme Court held that notwithstanding a presumptive sentencing "term" or range, "the judicial fact-finding that occurs when a judge exercises discretion to impose an upper term sentence ... under California law does not implicate a defendant's Sixth Amendment right to a jury trial." Conversely, the North Carolina Supreme Court correctly applied the rule in *Blakely* to that state's structured sentencing scheme and determined that the "statutory maximum" is equivalent to a "presumptive range" and thus "those portions of

[North Carolina law] which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence" violate the Sixth Amendment. *State v. Allen*, 2005 WL 1539186 (N.C., July 1, 2005). Despite superficial differences, California's sentencing scheme is much like North Carolina's statutes. Yet, the two courts reached diametrically and irreconcilable results on the question of whether the sentencing schemes were unconstitutional under *Blakely*.

The New Jersey Supreme Court recently summarized the significant national spilt of authority and characterized the now-minority view – which includes *Gomez* – as the "California approach." *State*

v. Natale, 2005 WL 1802084 (N.J. August 2, 2005). Actually, the Tennessee Supreme Court's opinion in *Gomez* predated California's *Black* opinion by over two months and thus *Gomez* is the point of the spear of those state courts which have rendered significantly aberrant interpretations of *Blakely*. This Court should resolve the issue here in *Gomez*, which can serve as precedent in other jurisdictions.

C. It Is Vital That This Court Correct The Tennessee Supreme Court's Misinterpretation Of The Sixth Amendment.

The mischief caused by the Tennessee Supreme Court's obviously incorrect interpretation of this Court's ruling is incalculable and should be remedied. Plea-bargaining resolves over ninety percent of the cases but Tennessee lawyers are at a loss as to how to advise their clients by the unsettled nature of the law. Even for those cases that result in contested trials the

parties are finding that finality is ephemeral. Proper implementation of the Sixth Amendment is "of surpassing importance." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

Notwithstanding the Tennessee Supreme Court's pronouncements in this case, the Tennessee General Assembly enacted a "*Blakely*-fix" to minimize the disruption caused by the obvious infirmity in the sentencing scheme. This legislation (which was signed into law on June 7, 2005 and became effective the same day) repealed the prior presumptive sentence provision. *See*, David Raybin, *The Blakely Fix*, 41 Tennessee Bar Association Journal 14 (July 2005). The new statute is prospective, applying only to crimes committed after the effective date of the Act. Thus the remedial legislation is of no comfort to the petitioners or legions of others who are still being

sentenced to this day under the provisions of the suspect statute. Until this constitutional issue is resolved the unnecessary resort to federal district courts will continue.

D. There Are No State Law Impediments To Deciding The Question Presented.

During the twilight between the Petitioners' appeal to the Court of Criminal Appeals and the Tennessee Supreme Court, this Court held in *Blakely v. Washington,* 124 S. Ct. 2531 (2004), that the Washington State sentencing system that allowed a judge to find facts necessary to increase a defendant's punishment above an otherwise binding "standard sentence" violated the Sixth Amendment right to trial by jury. It was only then that the Petitioners' definitively articulated the Sixth Amendment issues. Prior to that time even the Tennessee Supreme Court

determined that there were no Sixth Amendment infirmities in Tennessee sentencing law. *Graham v. State*, 90 S.W.3d 687 (Tenn.2002).

In resisting review here the State will complain that this Court has no "jurisdiction" to entertain this appeal because of the "plain error" controversy wrought by the Petitioners' alleged failure to "preserve" the Sixth Amendment issues at trial or in the Tennessee Court of Criminal Appeals. The government incorrectly assumes that the sentencing issue is immune to review here because the Petitioners did not satisfy state law notions of "plain error." If the State were correct then the Tennessee Supreme Court could have summarily resolved the Sixth Amendment issue by never reaching the question in light of "waiver." Instead, the Tennessee Supreme Court unquestionably reached the merits of

the Sixth Amendment issue *because* resolving the Sixth Amendment question was one of the "plain error" criteria under state law.

The Tennessee Supreme Court clearly held that plain error review under state law must consider the following factors: "(a) the record ... clearly establish[es] what occurred in the trial court; (b) a clear and unequivocal rule of law [has] been breached; (c) a substantial right of the accused [has] been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice." *Gomez*, 163 S.W.3d at 652, App. 232. The Tennessee Supreme Court found that the first factor was satisfied because the record disclosed what had transpired at the sentencing hearing.

The Court next determined "whether the [Petitioners'] sentences were imposed in violation of a 'clear and unequivocal rule of law.'" *Gomez*, S.W.3d at 653, App. 71. It was during *this* analysis that the Tennessee Supreme Court held that the Tennessee sentencing statutes did not violate *Blakely* as subsequently interpreted by *Booker*. This led to the conclusion that

> . . . [W]e are unable to accept the State's concession that the defendants' sentences were imposed in violation of the Sixth Amendment. In light of our holding that the defendants' sentences were not imposed in violation of the Sixth Amendment, the defendants are not entitled to relief because the record reflects no plain error.

Gomez, S.W.3d at 662-663, App. 101-102. Clearly, had the Tennessee Supreme Court resolved the Sixth Amendment issue the opposite way as urged by the Petitioners (and the State) another criteria of state "plain error" law may well have been satisfied and the

Tennessee Supreme Court could then have continued on with its analysis of the other plain error factors to determine if the Petitioners would have been entitled to relief. This process was halted in mid-analysis by the consideration of the Sixth Amendment issue, which the Petitioners (and the State) insist was incorrectly resolved in contravention of the opinions of this Court. That the "plain error" process has not been definitively concluded as a matter of Tennessee law in no way deprives this Court of "jurisdiction" to resolve the fundamental Sixth Amendment issue.

This Court need not reach any of these "plain error" questions since this case is perfectly postured to address the question presented here of *Booker's* impact, if any, on *Blakely*. That question answered, this matter can be remanded so the Petitioners can

litigate the remaining plain error issues in the Tennessee Supreme Court.

The intricacies of Tennessee plain error law are best left to Tennessee. Suffice it to say that, having resolved the Sixth Amendment issue the opposite way, the dissenting judges of the Tennessee Supreme Court thought "plain error" was satisfied, as has the Tennessee Court of Criminal Appeals in earlier cases in virtually the same situation. *See, State v. Johnson*, 2004 WL 2378256 (Tenn. Crim. App. 2004) and *State v. Farrar*, 2005 WL 639127 (Tenn. Crim. App. 2005). In this brace of cases the intermediate appellate courts reduced the sentences because several enhancement factors were applied in contravention of *Blakely*. A similar result can occur in the Petitioner's cases depending on the applicability of the remaining enhancement factors.

The State's complaint that this Court has no jurisdiction because the Tennessee Supreme Court's opinion ostensibly rested on some independent state ground should be rejected out of hand. The Petitioners ask no more here than did the government when it candidly requested the Tennessee Supreme Court reconsider its erroneous decision. The question of whether the Tennessee sentencing statute violates the Sixth Amendment is clearly a federal question. Indeed, there is no other question that needs to be resolved here.

III. CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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